SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

December Term, 1971

No. 71-734

JULIO RIVERA,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
STATEMENT	1
GOVERNMENT'S CASE	2
PETITIONER RIVERA'S DEFENSE	4
ARGUMENT	5
POINT ONE:	
THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT PETITIONER RIVERA AIDED AND ABETTED BEYOND A REASONABLE DOUBT	6
POINT TWO:	
IT WAS IMPROPER TO INTRODUCE EVIDENCE OF ANOTHER INCOMPLETED SIMILAR SUBSEQUENT TRANSACTION THUS DEPRIVING PETITIONER OF A FAIR TRIAL	9
CONCLUSION	12

CASES CITED

Clark v. United States, 293 F.2d 445	9
Nye & Neisson v. United States, 336 U.S. 613, S.Ct. 766, 769 ..	11

CASES CITED

	PAGE
United States v. Adams, 385 F.2d 546, 551	11
United States v. Cuadrado, 413 F.2d 633	11
United States v. Deaton, 381 F.2d 114	10
United States v. Johnson, 382 F.2d 280, 281	10
United States v. Knohl, 379 F.2d 427	10
United States v. Moses, 220 F.2d 166	8
United States v. Peoni, 100 F.2d 401, 402 (2nd Cir.)	8

STATUTES

Title 18, U.S.C. §2	1
Title 26, U.S.C. §4705(a)	1

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The petitioner, JULIO RIVERA, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming judgment of the United States District Court for the Southern District of New York.

OPINION BELOW

There was no opinion in the District Court, and the Court of Appeals affirmed the judgment of the District Court without opinion.

JURISDICTION

The date of the judgment sought to be reviewed is October 7, 1971. It was entertained the same date.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, §1254, United States Code.

STATEMENT

Petitioner was tried by jury and found guilty on June 4, 1971 of violation of Title 18 U.S.C. §2 (Aiding and Abetting) and Title 26 U.S.C. 4705(a).

The Court imposed the mandatory five (5) year minimum term. The conviction was affirmed by the United States Court of Appeals for the Second Circuit on

October 7, 1971.

GOVERNMENT'S CASE

Peter Wilcocki, an Agent with the Bureau of Narcotics and fellow Agent Pitts were in the vicinity of 12th Street and Greenwich Avenue, New York City, at about 1:30 P.M., and were watching two other Agents, Mosker and Nargi. They saw a man join Agent Nargi and together the three men entered an auto and drove to the Maritime Union where the man left the auto and returned shortly with another man and both then entered the auto occupied by Agents Mosker and Nargi.

Agent Wilcocki identified Rivera as the first man he saw and co-defendant Caraballo as the second one.

On June 17, 1969, he observed only Caraballo enter the auto occupied by the agents — not Rivera.

On cross-examination he stated that this was his only contact with Rivera and never saw him again until after Rivera's arrest.

Agent Nargi stated that on January 16, 1969, he and Agent Mosker met Rivera pursuant to a prior telephone conversation and that Rovera told him that he would introduce him to someone as they drove to the Maritime Union Hall. Rivera left the auto and returned with Caraballo. The Agents drove back to Greenwich Avenue and 12th Street and dropped Rivera off and there was no further contact with Rivera.

On cross-examination Agent Nargi stated there was no conversation relating to the sale of narcotics in the presence of both Rivera and Caraballo during the auto ride.

Casimiro Liotta, a chemist, stated that he examined the substance from

Caraballo and found that it contained 29 grams of cocaine and mannitol.

RIVERA'S DEFENSE

Julio Rivera testified in his own behalf, having recourse to an interpreter. He stated that he never sold cocaine to anyone and never know that Caraballo ever sold any to Agent Nargi.

That he knew Agent Nargi as Denny and on one occasion the agent asked him if he would care to make a connection for him. Rivera told him that he would introduce him to Caraballo who might be able to help him. After introducing Caraballo to the agents he left them.

After this final meeting Rivera did not see the agents again although they telephoned him many times at home. His response to their calls was that he didn't want to be bothered by them and was arrested shortly after his final

refusal to speak with Agent Nargi.

On cross-examination Rivera was asked various questions, e.g., were there many people around the Union Hall at the time of the original introduction? Did he meet Agent Nargi in December 1968? Rivera denied doing so; and he also denied calling Caraballo prior to the initial introduction.

Agent Nargi, on rebuttal, stated that Rivera told him that he would introduce Nargi to a person who sells cocaine. That later on he met Rivera with "Mario" and they all entered an auto where "Mario" offered to sell an ounce of cocaine for $600.

ARGUMENT

This Court should grant the petition for a writ of certiorari for the following reason:

The ruling of the Trial Court re-

garding testimony of subsequent criminal act was erroneous.

POINT ONE

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT APPELLANT RIVERA AIDED AND ABETTED BEYOND A REASONABLE DOUBT.

It should be considered that your petitioner does not have a criminal record with the possible exception of having once illegally worn a navy uniform in Puerto Rico in 1940.

Petitioner is forty-eight years of age, married for twenty-five years and the father of four children. He is a merchant seaman and was recently injured while so employed.

An important factor in evaluating Rivera's trial testimony was the unfortunate situation involving one of the Spanish interpretors. The first interpretor was compelled to be relieved in

the middle of Rivera's testimony because of her inability to adequately translate into English Rivera's words and thoughts. Another interpretor was used with better results.

It is virtually undisputed by either side that Rivera's sole involvement in the entire transaction was that he introduced the Narcotic Agents to co-defendant Caraballo. Rivera was not present during any conversation occurring between Caraballo and the agents relating to the sale of drugs. Furthermore, he was not present during the alleged sale of narcotics. Rivera received no money and thus did not profit from any alleged sale of drugs.

The question involved here is whether or not a person who introduced another person to a Narcotic Agent for the possible sale of narcotics is guilty in aiding and abetting if he had no

knowledge if the purchase occurred and had no further dealings after the introduction. United States v. Moses, 220 F.2d 166, appears to be directly in point.

In United States v. Moses, supra, appellant was a drug addict (not so in this case) and acted at the behest of buyers (as did Rivera). There is no other showing of association (as in the instant case).

In Moses, supra, the Court stated in part, reversing the conviction, that in order to aid and abet another to commit a crime it is necessary that defendant must in some manner participate in bringing it about and that his actions make it succeed. (Nye and Neisson v. United States, 336 U.S. 613, 69 S.Ct. 766, 769; United States v. Peoni, 100 F.2d 401, 402 (2nd Cir.).

In the instant case, petitioner associated himself only to the extent of introducing his co-defendant to the Narcotic Agents — at their request — and co-defendant may have been a possible seller of narcotics. It is felt that this conduct of Rivera, standing alone as it does, is insufficient. Clark v. United States, 293 F.2d 445.

POINT TWO

IT WAS IMPROPER TO INTRODUCE EVIDENCE OF ANOTHER INCOMPLETED, SIMILAR SUBSEQUENT TRANSACTION THUS DEPRIVING PETITIONER OF A FAIR TRIAL.

In rebuttal to testimony of your petitioner, Agent Nargi testified that a week after the crime alleged in the indictment, Rivera called him and offered to introduce him to a person who could sell him cocaine. Later, a meeting occurred with Agent Nargi, Rivera and a third person who said he

could sell cocaine for $600 an ounce. Over objection the Court below permitted this evidence to be admitted, limited to the issue of whether Rivera intentionally aided and abetted his co-defendant, Caraballo.

This evidence was highly prejudicial to Rivera in spite of the Court's limitation on its admissibility. The harmful inferences arising from that testimony were damaging to petitioner.

The commission of prior similar crimes may be admissible to show intent where the probative value of evidence outweighs its prejudicial character. United States v. Deaton, 381 F.2d 114; United States v. Johnson, 382 F.2d 281.

Where the probative value is slight and prejudice great, the Court should exclude the evidence, United States v. Knohl, 379 F.2d 427.

The testimony should have been rejected inasmuch as it did not concern a completed crime but only a possible cocaine sale. There was no evidence that the criminal transaction occurred. See, United States v. Adams, 385 F.2d 548, 551.

Agent Nargi's testimony should have been rejected since it concerned an event which occurred subsequent to the crime charged in the indictment. It is distinguishable from most cases on this point which involve similar prior acts of misconduct which are admitted to prove subsequent intent. It is less reliable to infer a person's prior intent from a future act than it would be to infer a present intent from a prior act. Although United States v. Cuadrado, 413 F.2d 633, allowed evidence of a subsequent sale, there it was a completed sale and went to rebut

a defense of alibi. It is clearly distinguishable from the case at bar. The reasons for rejecting the testimony far outweigh its limited probative value to petitioner's intent at a prior time. The Court's limiting instruction in no way removed the obvious prejudice to petitioner.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Attorney for Petitioner